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No. 1267

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

JOSEPH SCOLERI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Joseph Scoleri respectfully prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction on four counts of an indictment charging him with possession of goods stolen from interstate commerce knowing them to have been stolen in violation of 18 U.S.C. §659.

Opinion Below.

The only opinion is that issued by the United States Court of Appeals for the Seventh Circuit, No. 15726, a copy of which is made a part hereof.

Jurisdiction.

Jurisdiction is invoked under 38 U.S.C. §1254. Judgment was entered on March 15, 1967. Defendant did not file a Petition for Rehearing.

Questions Presented.

1. Did the conviction of Scoleri rest on any evidence at all?—Thus were the rights of defendant violated under the due process clause of the Fourteenth Amendment?

Statement of Case.

The facts stated in the opinion are correct and complete.

On June 23, 1965, two agents of the FBI observed the defendant, who was employed as a truck driver, drive his automobile into the loading dock area of his employer, get out of his automobile, get into a truck that he owned and leased to his employer, drive the truck to the company office about thirty feet away, enter the office, reappear a few minutes later, drive the truck back to its original position at the loading dock, and get out of the truck with the apparent purpose of going to his automobile which was parked next to the truck. At that time he was taken into custody.

ARGUMENT

I.

THERE WAS NO EVIDENCE AT ALL TO CONVICT SCOLERI—THUS HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WERE VIOLATED.

Defendant concedes that he had knowledge that the goods on the truck were stolen in interstate commerce. Defendant contends only that he did not have possession of the goods.

"He was never seen about the truck exercising any control, domination, or authority over it, either before or after the stolen butter was found in it," *United States* v. *O'Brien,* 174 F2d 341, 345. The testimony of the agents that he drove the truck thirty or forty feet to the office door and then back to its original position at the dock and that he then got out of the truck only demonstrated that he had no intention of exercising any control over the truck or its contents. This must have also been apparent to the agents, otherwise they would have waited to see whether defendant would in fact drive the truck out of the yard or remove the goods while it was parked at the dock before taking him into custody.

"To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature," *United States* v. *Wainer,* 170 F2d 603, 606, 7 Cir. (1948).

There is not the slightest evidence in this case that the defendant was associated in anyway with the placing of the merchandise on the truck nor is there the slightest

evidence that he made any effort to steal the merchandise or move the truck off the premises of his employer.

The unexpected turn of events must have been utterly confusing to the agents. They did not arrest the defendant. They took the defendant into custody, questioned him, and then released him.

Under these circumstances there was a complete failure on the part of the Government to prove that the defendant had possession of the merchandise and his conviction, therefore, violated the due process clause of the Fourteenth Amendment, *Thompson* v. *Louisville,* 362 U.S. 199.

CONCLUSION

For the reasons advanced defendant requests that the judgment entered be reversed or, in the alternative, that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted,

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Attorney for Petitioner
Joseph Scoleri

APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 15726 SEPTEMBER TERM, 1966 — JANUARY SESSION, 1967

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH SCOLERI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 15, 1967

Before HASTINGS, *Chief Judge,* SCHNACKENBERG, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Joseph Scoleri appeals from a judgment of conviction on four counts of an indictment charging him with possession of goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. § 659.[1] The sole question is whether the evidence is sufficient to prove the defendant's possession of the goods with knowledge that they were stolen.

[1] The defendant was tried by the district court sitting without a jury. He received a sentence of four years' imprisonment on each count, the sentences to run concurrently.

The defendant was employed as a truck driver by the JB Cartage Company, Chicago, Illinois. He owned a panel truck which he leased to his employer. At about 6:00 p.m. on June 23, 1965, after the company had closed for the day, the defendant was observed returning to the company's place of business in his automobile. He parked the car next to his truck, which was backed against a loading platform.

The defendant began to move in and around the truck. He ascended the loading dock, parted a tarpaulin hanging at the rear of the truck, and thrust his head inside for a moment. He retreated from this position, climbed into the cab of the truck, and drove the truck to the company's office thirty feet from the loading dock. The defendant again appeared to look into the back of the truck. He entered the office, reappeared a few minutes later, and returned the truck to its original position.

At this point, two federal agents who had been observing the defendant made their presence known. After identifying themselves and warning the defendant of his rights, the agents asked the defendant what he was doing on the premises. The defendant replied that he was just "hanging around" and that he had returned to have his truck serviced. In response to another question, the defendant stated that the truck was empty and invited the agents to look for themselves. When the tarpaulin was parted, the defendant expressed surprise at the presence in plain sight not more than two feet away, of several clearly-marked shipping cartons containing clothing and other materials. Many of the containers had been opened, revealing their contents. The cartons later proved to have been recently stolen from interstate shipments.

The defendant admitted that the "stuff looks hot" and that "it looks like it is stolen." Shortly thereafter, he explained that he was in the habit of selling merchandise purchased on Maxwell Street. He stated that he had intended to appropriate a portion of the goods in the truck for sale as "seconds," but that "someone beat

[him] to it." The defendant later remarked that "it looks pretty bad. It looks like I am caught with the stuff." He added, "Can't I do something to help myself?"[2]

From this evidence the district judge could conclude beyond a reasonable doubt that the defendant was in possession of goods known to have been stolen from interstate commerce. The defendant's ownership of the truck and his exercise of control and authority over it immediately prior to the discovery of the stolen merchandise by the agents establish his possession of the goods. *United States* v. *Spatuzza,* 331 F.2d 214, 216 (7th Cir.), *cert. denied.* 379 U.S. 829 (1964). His actions in twice looking into the rear of the truck, the markings on the shipping containers, and his statements to the agents plus the inference arising from his unexplained possession of recently stolen goods, *United States* v. *Casalinuovo,* 350 F.2d 207, 211 (2d Cir. 1965), are sufficient to prove the defendant's knowledge that the goods were stolen from interstate commerce.

The judgment is affirmed.

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[2] At other times, and at the trial, the defendant contended that he was a victim of a "frame."

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, March 15, 1967

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

No. 15726

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH SCOLERI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record for the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1267

JOSEPH SCOLERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury-waived trial in the United States District Court for the Northern District of Illinois petitioner was convicted on four counts of an indictment charging possession of goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 659 (App. 1-4).[1] On April 15, 1966 he

[1] "App." refers to the printed appendix of the defendant-appellant in the court of appeals.

was given concurrent sentences of imprisonment on each of the four counts pursuant to 18 U.S.C. 4208 (a)(2) (App. 2). On appeal the conviction was affirmed (Pet. App. 1a-4a). The petition for a writ of certiorari was filed on April 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Evidence adduced at the pre-trial motion to suppress evidence, which the court overruled (App. 18), and at the trial may be summarized as follows:

Petitioner, a truck driver, owned a truck which he leased to his employer, the JB Cartage Company, of Chicago, Illinois (App. 10, 24, 25). On June 23, 1965, a previously reliable informant told a F.B.I. supervisor that petitioner had a load of goods stolen from an interstate shipment in a red panel truck at the JB Cartage Company, that petitioner was driving a late model orange Pontiac, and that the goods were going to be removed from the truck (App. 16-17). The supervisor notified two F.B.I. agents who undertook a surveillance (App. 6, 13).

At about 6:00 p.m. the agents observed that petitioner parked his Pontiac next to his truck, which was next to a loading dock (App. 6, 13, 18, 21). While standing on the loading dock, petitioner pulled back a tarpaulin from the rear of the truck and looked inside. After driving the truck about 30 or 40 feet to the company's office, he again looked in the back of the truck. He entered the office for a few minutes, then reappeared, and drove the truck back to its original position (App. 6-7, 13-14, 18-19, 21).

Thereupon the two agents identified themselves, warned petitioner of his rights, and inquired as to why he was on the premises. Petitioner answered that he was just "hanging around" and had returned to have his truck serviced. When the agents asked what was in the truck, petitioner said, "I will show you what is in the truck. Nothing is in the truck." When the tarpaulin was parted, petitioner expressed surprise at seeing, about two feet away, a number of shipping cartons, many of which had been opened and contained clothing and other materials (App. 7, 14-15, 19, 21-22). The cartons and their contents later proved to have been recently stolen from interstate shipments. Petitioner admitted that the cartons looked like "hot stuff" (App. 15).

At about 7:30 p.m. one of the agents asked the terminal manager of JB Cartage Company whether the merchandise belonged on the truck and he said it did not (App. 9, 16, 19-20, 22). Petitioner said, "This looks—it looks pretty bad. It looks like I am caught with the stuff. Can't I do something to help myself?" (App. 20). Petitioner at all times insisted that he did not know the discovered merchandise was in his truck. He was taken to F.B.I. headquarters at about 9:45 p.m., and was released without being charged at that time (App. 23).

Petitioner testified that he had no knowledge of the merchandise on his truck, that he did not place it there, and that he did not know who did (App. 25). He also testified, with corroborating testimony by two other witnesses, that he did not pull back the tarpaulin to look into the truck and did not drive the

truck from the dock to the office and back to the dock (App. 25, 26, 27).

Petitioner now concedes that he did have knowledge that the goods on the truck were stolen in interstate commerce (Pet. 3). He contends only that there was no evidence at all that he had possession of the goods. This contention is amply refuted by the evidence set forth *supra* (see also the opinion of the court below, Pet. App. 2a-3a). Petitioner owned the truck, exercised complete control and authority over it when he drove it to his employer's parking lot, and was effectively in possession of the stolen merchandise when discovered by the agents. *E.g.*, *United States* v. *Spatuzza*, 331 F. 2d 214, 216 (C.A. 7), certiorari denied, 379 U.S. 829; *United States* v. *Casalinuovo*, 350 F. 2d 207, 209-210 (C.A. 2); *United States* v. *Thomas*, 282 F. 2d 191, 193 (C.A. 2); *Sterling* v. *United States*, 333 F. 2d 443, 446 (C.A. 9), certiorari denied, 379 U.S. 933. The situation here is thus different from that in *United States* v. *O'Brien*, 174 F. 2d 341, 345 (C.A. 7), relied upon by petitioner. There the defendant had merely been sitting with his co-defendant in the latter's truck prior to the time when stolen butter was found on the vehicle. The question raised manifestly does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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BEATRICE ROSENBERG,
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Attorneys.

MAY 1967

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